

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

COBBLESTONE WIRELESS, LLC, <i>Plaintiff,</i>	§	
	§	
	§	
v.	§	
	§	CASE NO. 2:22-cv-00477-JRG-RSP
T-MOBILE USA, INC. <i>Defendant,</i>	§	(Lead Case)
	§	
	§	JURY TRIAL DEMANDED
NOKIA OF AMERICA CORPORATION, ERICSSON INC. <i>Intervenors.</i>	§	
	§	
	§	
COBBLESTONE WIRELESS, LLC, <i>Plaintiff,</i>	§	
	§	
	§	
v.	§	
	§	CASE NO. 2:22-cv-00474-JRG-RSP
AT&T SERVICES INC.; AT&T MOBILITY LLC; AT&T CORP., <i>Defendants,</i>	§	(Member Case)
	§	
	§	JURY TRIAL DEMANDED
NOKIA OF AMERICA CORPORATION, ERICSSON INC. <i>Intervenors.</i>	§	
	§	
	§	
COBBLESTONE WIRELESS, LLC, <i>Plaintiff,</i>	§	
	§	
	§	
v.	§	
	§	CASE NO. 2:22-cv-00478-JRG-RSP
CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, <i>Defendant,</i>	§	(Member Case)
	§	
	§	JURY TRIAL DEMANDED
NOKIA OF AMERICA CORPORATION, ERICSSON INC. <i>Intervenors.</i>	§	
	§	
	§	

**DEFENDANTS' AND INTERVENORS'
MOTIONS IN LIMINE**



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Exhibit No.	Description
1	Excerpts of Transcript of Deposition of Jay Chung, dated May 9, 2024 (“Chung Dep.”)
2	Excerpts of Expert Report of Stephen E. Dell, CVA Relating to Damages, dated May 24, 2024, served in <i>Cobblestone Wireless, LLC v. T-Mobile USA, Inc.</i> , No. 2:22-cv-477 (E.D. Tex.) (“Dell T-Mobile Rpt.”)
3	Excerpts of Expert Report of Stephen E. Dell, CVA Relating to Damages, dated May 24, 2024, served in <i>Cobblestone Wireless, LLC v. AT&T Inc. et al.</i> , No. 2:22-cv-474 (E.D. Tex.) (“Dell AT&T Rpt.”)
4	Excerpts of Errata and Supplement to the Expert Report of Stephen E. Dell, CVA Relating to Damages, dated June 21, 2024, served in <i>Cobblestone Wireless, LLC v. AT&T Inc. et al.</i> , No. 2:22-cv-474 (E.D. Tex.) (“Dell Supp. AT&T Rpt.”)
5	Excerpts of Expert Report of Stephen E. Dell, CVA Relating to Damages, dated May 24, 2024, served in <i>Cobblestone Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless</i> , No. 2:22-cv-478 (E.D. Tex.) (“Dell Verizon Rpt.”)

I. MIL 1: PRECLUDE COBBLESTONE WITNESSES FROM TESTIFYING ABOUT MATTERS AS TO WHICH COBBLESTONE CLAIMED PRIVILEGE DURING DISCOVERY.

Cobblestone is an organization whose [REDACTED], Jay Chung, is a former patent litigator with Russ August & Kabat, counsel of record for Cobblestone in this litigation. Cobblestone purchased the patents-in-suit [REDACTED]

[REDACTED].

During discovery, Defendants served a 30(b)(6) deposition request upon Cobblestone directed to topics such as how Cobblestone valued the patents, its technical due diligence (infringement and validity), and its analysis of potential licensing targets. The thrust of these topics were to understand how Cobblestone would explain at trial why it was able to purchase patents [REDACTED]. In response, Cobblestone uniformly claimed privilege over all the due diligence work that Mr. Chung, a lawyer, performed. Although he said he reviewed claim charts, identified targets, and did a validity analysis, he quickly claimed privilege and refused to provide any documents or testimony describing or supporting the technical analysis or valuation of the patents.

Defendants file this motion *in limine* to preclude Cobblestone from presenting testimony or other evidence on these matters for which it has claimed privilege. Defendants are concerned that, despite asserting privilege in his deposition, Mr. Chung (who will be Cobblestone's corporate representative and likely only fact witness) will tell the jury that he identified an overlooked "gem in the rough" and, as a result of extensive analysis, was able to acquire the patents-in-suit for a fraction of their real value.

Such testimony, if permitted, would be highly unfair and prejudicial. Because Cobblestone refused to provide, on the grounds of privilege, any claim charts, prior art analysis, licensing target

Cobblestone’s witnesses should not be able to waive privilege on the stand and testify about issues over which privilege was claimed during discovery. “Considerations of fairness require that a litigant should not be able to claim reliance on advice of counsel as a defense, and hence a sword in litigation, while at the same time asserting attorney-client privilege or work product doctrine as a shield to protect against the opposing party testing the legitimacy of that claim.” *TIVO Inc. v. EchoStar Commc’ns Corp.*, No. 2:04-CV-1 (DF), 2005 U.S. Dist. LEXIS 42481, at *16 (E.D. Tex. 2005); *see also SynQor, Inc. v. Artesyn Techs., Inc.*, No. 2:07-CV-497-TJW-CE, 2011 U.S. Dist. LEXIS 91693, at *83 (E.D. Tex. 2011) (“By sustaining SynQor’s objections, the Court did not permit the Fish Defendants to affirmatively assert that they had searched for and failed to uncover SynQor’s patents while denying all discovery into the scope of that search.”), *aff’d*, 709 F.3d 1365 (Fed. Cir. 2013).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For each of these subjects, Cobblestone should not be able to waive privilege on the witness stand and testify to matters that were shielded by privilege during discovery. *See TIVO*, 2005 U.S. Dist. LEXIS 42481, at *16.

II. MIL #2: PRECLUDE FACT WITNESSES FOR COBBLESTONE FROM OFFERING OPINION TESTIMONY ABOUT THE VALUE, TECHNICAL BENEFITS, OR INFRINGEMENT AND VALIDITY OF THE ASSERTED PATENTS.

Cobblestone, and in particular its corporate representative Mr. Chung, should be precluded from offering opinions regarding the value, features, and technical benefits of the Asserted Patents.

[REDACTED]

Smart Path v. Nokia, No. 2:22-cv-343, Dkt. No. 239 at 4 (E.D. Tex. March 25, 2024) (granting MIL preventing Smart Path’s corporate representative, Mr. Pitcock, from testifying as to the substance and alleged benefits of the Asserted Patents). Mr. Chung is a fact witness and has not served an expert report or disclosure of opinions in this matter.

During his 30(b)(6) deposition, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As a patent litigator testifying in this matter as a corporate representative, there is a substantial risk Mr. Chung will advocate from the witness stand. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thus, any testimony from Mr. Chung regarding the substance and any alleged benefits of the Asserted Patents would constitute improper opinion testimony by a lay witness. FED. R. EVID. 701. A lay witness must have “personalized knowledge” of the facts underlying a lay opinion. *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 373 (5th Cir. 2002); *see also Perret v. Nationwide Mut. Ins. Co.*, No. 4:10-cv-00522, 2013 U.S. Dist. LEXIS 192945, at *7–8 (E.D. Tex. July 18, 2013) (“Since [witness] had no personal knowledge . . . , any such testimony would constitute an expert, as opposed to a lay, opinion”). Allowing Mr. Chung to testify regarding the Asserted Patents would effectively allow Cobblestone to introduce attorney argument as “factual” testimony. Ex. 1 (Chung Dep.) 62:6-9; *Elcommerce.com, Inc. v. SAP AG*, 745 F.3d 490, 506 (Fed. Cir. 2014) (“Attorney argument is not evidence.”).

III. MIL #3: PRECLUDE DISCUSSION OF BUSINESS-WIDE REVENUE OR CONSOLIDATED WIRELESS REVENUE OF THE CARRIERS.

Defendants and Intervenor seek to preclude discussion by Cobblestone or its experts, including Mr. Dell, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] were presented to the jury, it would violate an “important evidentiary principle” because it “cannot help but skew the damages horizon for the jury” and “make a patentee’s proffered damages amount appear modest by comparison.” *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226-27 (Fed. Cir. 2014) (quoting *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011)).

[REDACTED]

[REDACTED]

[REDACTED] See Ex. 2 (Dell T-Mobile Rpt.) at ¶¶ 165, 387, Attachments 5.1, 5.2, 15; Ex. 3 (Dell AT&T Rpt.) at ¶¶ 168, 381, Attachments 8.5, 10; Ex. 4 (Dell Supp. AT&T Rpt.) at ¶¶ 4, 5, Appx. A at 2, Corrected Attachments 8.5, 10; Ex. 5 (Dell Verizon Rpt.) at ¶¶ 146, 360, Attachments 6.4, 6.5, 13. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹ Allowing Mr. Dell to present his [REDACTED] number without showing the math containing the overall revenues balances the need to avoid skewing the damages horizon while still permitting Mr. Dell to present his theories to the jury.

The Federal Circuit has explicitly stated that “disclosure of the end product’s total revenue cannot help but skew the damages horizon for the jury, regardless of the contribution of the patented component to this revenue.” *Commonwealth Sci. & Indus. Rsch. Organisation v. Cisco Sys.*, 809 F.3d 1295, 1302 (Fed. Cir. 2015). The Federal Circuit has thus cautioned District Courts and litigants to “avoid misleading the jury by placing undue emphasis on the value of the entire product.” *Id.* (emphasis added). Thus, overall revenue figures, whether at the company or end-user level, are legally irrelevant and only risk to prejudice the jury towards an inflated damages award. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011). For these reasons, this Court routinely precludes reference to total revenue and other similar financial information. *See, e.g., Intellectual Ventures I LLC v. T-Mobile USA Inc.*, No. 2:17-cv-577-JRG (E.D. Tex. Jan. 8, 2019), Dkt. No. 294 at 5; *Implicit, LLC v. Trend Micro, Inc.* No. 6:16-cv-80-JRG (E.D. Tex. Oct. 3, 2017), Dkt. No. 253 at 6; *Huawei Techs. Co. Ltd. v. T-Mobile US, Inc.*, No. 2:16-cv-52-

¹ Note that the Defendants may contest whether the [REDACTED] number utilized by Mr. Dell is properly apportioned.

[REDACTED]

JRG-RSP (E.D. Tex. Sept. 29, 2017), Dkt. No. 440 at 11 (“Dr. Vander Veen may explain how he calculated the revenue per customer per month attributable to the LTE network from his starting estimate of the average revenue per customer per month.”); *BMC Software, Inc. v. ServiceNow, Inc.*, No. 2:14-cv-903-JRG, 2016 WL 379620, at *3 (E.D. Tex. Feb. 1, 2016); *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, No. 4:14-cv-371, 2016 U.S. Dist. LEXIS 106535, at *4-5 (E.D. Tex. Feb. 1, 2016); *SimpleAir, Inc. v. Google Inc.*, No. 2:14-cv-11-JRG (E.D. Tex. Oct. 6, 2015), Dkt. No. 325 at *4.

The Court’s Standing Order on Motions *in Limine* provides for Court MIL No. 3, which states: “The parties shall be precluded from introducing evidence, testimony, or argument concerning any party’s overall financial size, wealth, or executive compensation.”² Defendants and Intervenors seek the present additional MIL to confirm and clarify that Cobblestone and Mr. Dell may not show overall wireless subscriber revenue numbers to the jury under the guise of explaining Mr. Dell’s methodology. Presenting these numbers to the jury is far more prejudicial than it is probative. *See* FED. R. EVID. 402, 403.

IV. CONCLUSION

For the forgoing reasons, Defendants and Intervenors respectfully request that this Court grant their Motions *in Limine*.

Dated: July 29, 2024

Respectfully submitted,

/s/ David S. Frist

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²<https://www.txed.uscourts.gov/sites/default/files/judgeFiles/12.14.22%20Standing%20Order%20on%20Motions%20in%20Limine.pdf>.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served by e-mail on July 29, 2024 on all counsel who have consented to electronic service.

/s/ David S. Frist

David S. Frist

CERTIFICATE OF CONFERENCE

I hereby certify that Defendants and Intervenor have complied with the meet and confer requirements set forth in Local Rule CV-7(h). Counsel for Defendants and Intervenor met and conferred with counsel for Plaintiff on July 26, 2024. No agreement was reached regarding the relief sought in this motion.

/s/ David S. Frist

David S. Frist